or pending the development of a survey methodology, the Commission should adopt one of the presumptions proposed by Comcast, AT&T or GTE. Comcast's study is grounded in publicly available, empirical data, but even AT&T's and GTE's more conservative presumptions may be appropriate for use in the short term, at least outside of the top markets. Whatever it does, however, the Commission must not leave the determination of the number of attaching entities per pole for purposes of calculating pole attachment rates to the unfettered discretion of pole owners seeking to maximize their pole attachment revenues, as proposed by the overwhelming majority of pole owners.

VI. The Comments Confirm that Telecommunications Carriers' Attachments Require Less than a Foot of Usable Pole Space.

In its opening Comments, ICG noted that no provision of the National Electrical Safety Code ("NESC") requires a one foot vertical clearance between parallel communications cable spans. Despite this, a number of parties in their comments referred to a one foot clearance supposedly required by the NESC. ICG has combed through the latest edition of the NESC looking in vain for such a requirement. In any event, however, the use of overlashing, extension arms,[45] cable brackets,[46] dual side attachments[47] and similar attachment techniques clearly make it possible to install more than one telecommunications cable per usable foot of pole space.

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[45] *See* RCN Comments at 7–8.

[46] *See* Comments of AT&T Corp. in Docket No. 97–98 at 6.

[47] *Id.*

ICG recognizes that many pole owners require attaching entities to space their cables one foot apart on the pole. The Commission has already held, however, that pole attachment policies should be governed by generally accepted engineering practices and not by the preferences of pole owners. If the Commission makes it clear now that section 224(e) rates will be based on the use of six inches of usable space in most cases,[48] utilities may stop imposing unnecessary makeready costs on attaching parties and instead increase their pole attachment revenues by permitting more attaching parties on each pole.

VII. The Comments Confirm that a One Quarter Duct Approach Is Appropriate for Allocating the Cost of Usable Conduit Space.

As ICG discussed in its opening Comments, the widespread use of innerduct supports the use of a "quarter duct" methodology for apportioning the cost of usable space in ducts and conduits, rather than the Commission's proposed "half duct" approach. Several other parties supported a presumption of three or more telecommunications cables per duct.[49] No commenter presented a valid argument for the "half duct" approach. GTE supports the "half duct" proposal without discussion.[50] SBC supports it as well, contending that proposals such as ICG's are "based on a hypothetical future network constructed in the

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[48] As ICG noted in its opening Comments, telecommunications carriers who attach their cables in the electric supply space on the pole should be allocated sixteen inches of usable space.

[49] MCI Comments at 21–22 (presumptive average of 3.5 available innerducts per duct); AT&T Comments at 16–17 (one-third duct approach); NCTA Comments at 25 (quarter-duct convention).

[50] GTE Comments at 14.

most efficient manner using state-of-the-art construction methods under ideal conditions"[51] and notes that "the vast majority of embedded base of conduit was not constructed using current construction practices."[52] It is standard practice among most of the utilities with which ICG shares conduit, however, to install three to six innerducts per duct in both new and existing construction. Indeed, ICG's agreement with Southwestern Bell Telephone Company, owned by SBC, contemplates the installation of innerduct in existing conduits, although the rate is based upon the half duct methodology.

Some representatives of electric utilities contend that the half duct approach is inappropriate for electric utility conduits because NESC Rule 341(A)(6) prohibits electrical supply and communications cables from sharing the same duct unless they are maintained by the same utility, citing other presumed hazards to the communications cable as well.[53] Utilities acknowledge, however, that agreements do exist under which electric utilities and telecommunications carriers share ducts.[54] The arguments against such duct sharing involve risks to the communications cable, not the electric power cable.[55] Any utility that agrees to maintain a telecommunications carrier's cables in order

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[51] SBC Comments at 31.

[52] *Id.* at 32.

[53] EEI/UTC Comments at 28–29. *See also* Ohio Edison Comments at 47; Union Electric Comments at 44–45; Duquesne Comments at 49–50.

[54] Ohio Edison Comments at 47 n. 37; Union Electric Comments at 45 n. 35; Duquesne Comments at 50 n.37.

[55] EEI/UTC Comments at 28–29; Ohio Edison Comments at 47; Union Electric Comments at 44–45; Duquesne Comments at 49–50.

to enable duct sharing must do so for any other telecommunications carrier that is willing to assume those risks.[56]

These utility interests' comments also make clear that their arguments against the half duct methodology are simple attempts to over-allocate costs to telecommunications carriers. In almost the same breath, they advocate charging telecommunications carriers for the use of a full duct[57] and seek to require the first telecommunications carrier installing facilities in a duct bank to pay for the installation of innerduct in order to make space available for other telecommunications carriers.[58] Although the Commission's policies concerning upgrade costs may permit charging a telecommunications carrier for the installation of innerduct, a telecommunications carrier that is in fact occupying only one-quarter of a duct and has paid the cost of installing innerduct so that other telecommunications carriers may do the same manifestly should not be charged for occupying the entire duct.

The Commission's conduit rate methodology should be based upon common practices in use today. In virtually all urban areas it is now the practice to install innerduct in both new and existing conduit in order to permit the installation of three to six

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[56] The risk of damage to a telecommunications cable is of lesser operational significance if the cable is part of a self-healing SONET architecture.

[57] EEI/UTC Comments at 28–29; Ohio Edison Comments at 47; Union Electric Comments at 44–45; Duquesne Comments at 49–50.

[58] EEI/UTC Comments at 29; Ohio Edison Comments at 49; Union Electric Comments at 46; Duquesne Comments at 51–52.

communications cables per duct. The Commission accordingly should allocate usable duct space costs on the basis of a quarter duct methodology.

VIII. Other Issues.

A. The Commission Should Affirm Utilities' Obligation to Provide Nondiscriminatory Access to Their Rights-of-Way.

Some utilities contend that the Commission should not regulate rates for access to their rights-of-way, independent of attachment to their poles, ducts and conduits, because they may not have the necessary property rights under state law to permit the installation of telecommunications facilities in their rights-of-way.[59] Regardless of the ultimate determination of whether utilities can be required to exercise the power of eminent domain to acquire additional property rights for attaching parties if they would do so for their own core businesses, utilities have an obligation to consent on a nondiscriminatory basis to the location of telecommunications carriers' facilities in their rights-of-way. Even if a utility cannot provide the complete bundle of rights required in order for a telecommunications carrier to install its facilities in a utility right-of-way, as noted by American Electric Power *et al.*, applicable law may require the utility's consent before a carrier that has obtained the necessary rights from other parties may do so.[60] While circumstances may vary too much to permit the Commission to adopt a specific rate formula, it should make it clear that utilities must grant such consent upon reasonable and nondiscriminatory terms. Moreover, if a utility voluntarily undertakes to acquire

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[59] AEP Comments at 59–63.

[60] AEP Comments at 62.

additional property rights for any attaching telecommunications carrier (including its own telecommunications affiliate), it must do so for all.

B. The Commission Should Clarify that Both Owners of a Jointly Owned Pole Have Obligations Under Section 224.

ICG also supports the request by Omnipoint Communications Inc. that the Commission clarify that incumbent LECs and electric utilities that jointly own poles are individually and severally obligated by section 224 to provide telecommunications carriers with nondiscriminatory access to their poles. The LEC and electric utility should be permitted to agree that one or the other of them will have primary responsibility for administering pole attachment relationships, but each is obligated to respond promptly to an access request. Moreover, because of the competitively sensitive nature of some of the information that must be disclosed during the process of obtaining engineering approvals to use particular poles, competitive LECs should have the option of dealing with the electric utility, rather than the incumbent LEC, for access to jointly owned poles.

C. Electric Utilities' Attacks on the Historic Cost Basis of the Pole Attachment Rate Formula Are Beyond the Scope of this Proceeding and Lack Substantive Merit.

Since the first days of pole attachment rate regulation, the Commission has consistently based pole attachment rates on historic costs. That approach has been repeatedly validated by Congress[61] and upheld by the courts and is followed by many

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[61] *See* Comments of the National Cable Television Association in Docket No. 97–98 at 7 (Commission's rate formula was "considered and re-validated by Congress in 1983, when it lifted the formula's five-year sunset provision contained in the original version of Section 224; in 1984, when it amended Section 224 as part of the sweeping Cable Communications Policy Act of 1984 but left the formula intact; in 1992, when it passed the Cable Competition and Consumer Protection Act; and in 1996, when it passed the Telecommunications Act of 1996 and retained the formula").

states that regulate pole attachments.[62] Several electric utilities now claim that the Commission can and should simply ignore twenty years of consistent application of section 224 in favor of one or more "replacement cost" approaches, which the electric utilities' proposed formulas demonstrate are in fact "hybrid" mixes of historic construction practices and replacement costs designed only to maximize rates,[63] not true forward looking economic cost methodologies as they claim. Yet the electric utilities do not even attempt to demonstrate how their approaches could be consistent with settled constructions of section 224. Similarly, they fail to reconcile their proposals with the economic principles they purport to embrace. For example, while they propose to calculate total costs on the basis of forward-looking labor and material costs, they would not base rates upon forward-looking construction techniques that use space more efficiently and thus reduce unit costs.

In any event, the Commission quite properly limited the scope of the NPRM to proposed adjustments to its existing historic cost-based formula. The Commission did not address the possibility of abandoning its formula and did not contemplate any fundamental changes in the basic approach to determining pole attachment rates that are not plainly dictated by the differences between sections 224(d) and (e), despite AT&T's observation in its Reply Comments in Docket No. 97–98 that if the Commission believed that reconsideration of its historic cost approach was appropriate, it should notice that

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[62] *See, e.g.*, NYEU Comments at 2.

[63] *See, e.g.*, Comments of American Electric Power Service Corporation, *et al.* in Docket No. 97–98 at 44.

issue in this proceeding. Most commenters have focused on the noticed issues. The Commission should not permit the electric utilities to transform this proceeding into a one-sided referendum on "replacement cost" pricing that by virtue of its late introduction would deprive commenters of a full opportunity to address the unique and complex legal, regulatory and economic characteristics of poles and conduit.

IX. Conclusion

For the reasons stated herein and in ICG's opening Comments, the Commission should provide guidance concerning good faith negotiations and adopt a clear and predictable rate methodology while rejecting efforts to erect unauthorized procedural barriers to pole attachment complaints; should rule that a utility may not restrict or charge additional fees for dark fiber leasing, except that a CATV operator may not lease dark fiber to others while paying the CATV-only pole attachment rate; should reject the discriminatory proposal to excuse CATV operators from paying telecommunications attachment rates for all attachments used to provide telecommunications services; should recognize that all revenue-producing users of a pole or conduit are attaching entities for purposes of the allocation of unusable space costs; should adopt the presumptions concerning the average number of attaching entities per pole proposed by other parties pending the implementation of a national survey as proposed in ICG's opening Comments; should allocate the cost of usable space on poles based upon a requirement of six inches, rather than one foot, per attachment; should allocate the cost of usable duct space using a quarter duct methodology; should affirm utilities' obligations to provide nondiscriminatory access to rights-of-way; should clarify the section 224 obligations of

owners of jointly owned poles; and should reject the efforts of some electric utilities to increase pole attachment rates through the application of unprecedented and economically unsound replacement cost methodologies.

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